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Smokers' Rights In the Workplace:

An Employee Guide

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Overview

Job security, wages, health benefits and child care are just some of the many issues facing workers and management today. Some of these issues stir the interest and concern of workers more than others do.

Workplace smoking is one issue of current interest. In some situations, workplace smoking is strictly governed by state or local laws or regulations. In other situations, however, employers and employees have the ability to fashion their own approach to this issue. In many of these cases, a reasonable and accommodating decision is reached. However, in some instances, further discussions are needed:

To resolve workplace smoking disputes reasonably, and to prevent unfair and unnecessary restrictions, you must fully understand the facts about workplace smoking; methods for accommodating—and satisfying—both smokers and nonsmokers, and your rights and responsibilities as a smoker. You must, of course, also be aware of any laws that apply.

What follows are answers to common questions about smokers' rights in the workplace. If your employer has adopted an unfair policy, is considering adopting a smoking policy or is currently drafting one—or if you are being harassed by your employer or other employees for smoking on or off the job—this booklet is designed to help you. For further information, including information about applicable laws or regulations, contact The Tobacco Institute at 1875 I Street, Northwest, Washington, D.C. 20006.

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How should I respond if my employer says that nonsmokers have a legal right under state or federal law to insist that smoking be banned in the workplace?

According to state law, employers must provide a reasonably safe working environment. Anti-smoking advocates sometimes interpret this obligation as giving them a right to demand that smoking be banned in the workplace. Only once, in a lower court ruling in 1976 in New Jersey, has a court agreed with such an interpretation. This decision was limited to New Jersey, and the theory was later rejected in a case in the same state in 1983.

In the second case, an employee tried to force her employer to adopt a variety of smoking restrictions. In ruling against the employee, the court wrote

What we are really being asked for here is to impose upon every employee . . . who wishes to smoke a regime, a form of discipline which goes well beyond the reasonable, all under the guise of catering to the very particularized needs of a supersensitive person. That is not appropriate.

The court concluded:

[T]here simply is no warrant and no justification as a matter of civilized management of a work force to treat smokers as though they were moral lepers and to banish them to a remote isolated area of the workplace and that [w]hen one gets right down to it is essentially what the plaintiff it seems to me is asking for in this case.

Claims that the U.S. Constitution guarantees a totally smoke-free environment also have been unanimously rejected by the courts. In that connection, a federal district court judge in Louisiana wrote in 1976 that to find in the Bill of Rights of the U.S. Constitution a right to a smoke-free environment . . .

would be to mock the lofty purposes of such amendments and broaden their penumbral protections to unheard-of boundaries . . . The inevitable result would be that type of tyranny from which our founding fathers sought to protect the people by adopting the first ten amendments.

Nevertheless, many local governments, and some state governments as well, have enacted laws that govern smoking in the workplace. If your employer tells you that he is simply attempting to comply with applicable laws or regulations, ask him to show you the precise legal basis for his actions. Then contact your bargaining representative—or The Tobacco Institute—to determine whether the law requires your employer to act as he proposes to do.

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What are my rights as a smoker?

Apart from any requirements established by law, your rights are determined by common standards of human behavior. For example, you are entitled to common courtesy and respect from others for your personal lifestyle and preferences—including your choice to smoke. If your employer decides to implement workplace smoking restrictions, you should insist on the right:

- To be consulted before a policy is adopted
- To be reasonably accommodated by the policy
- To have your preferences considered on an equal basis with nonsmokers
- To take any dispute or policy discussion to your union, if you are represented by one
- To be free of harassment, verbal or otherwise, and
- To be told the legal basis for the policy.

Do most companies have strict smoking policies?

No. Very few companies completely prohibit smoking. In fact, 81 percent of companies permit smoking.

Most employers prefer to review smoking disputes on a case-by-case basis and to accommodate both smoking and nonsmoking employees. The firms that have developed policies have done so primarily to reduce smoking around sensitive equipment or food processing areas or to comply with city or state regulations.

Some anti-smokers are harassing me. What can I do?

Arrange a private meeting to raise your concerns with those who are harassing you. Discuss your differences. Work on ways to prevent them from straining office relationships further.

If they won't cooperate or meet, say firmly that you don't want to alarm management unnecessarily with your concerns. Say that, on the contrary, you would prefer to work out the issue quietly and calmly amongst yourselves.

If that doesn't work, arrange a meeting with management to discuss the issue. Request the presence at the meeting of the person harassing you and your supervisor as a gesture of willingness to reach a solution that is balanced and fair to all parties. At the meeting, express your interest once again in reaching a solution that accommodates everyone.

**How can I prevent
a strict anti-smok-
ing policy or
smoking ban from
being enacted, if
none is required
by law?**

Schedule a meeting to discuss the issue with those responsible for developing the policy or ban. Before the meeting, do some research:

- Find out the company's existing smoking policy. If none exists, find out if any local or state ordinances apply.
- Talk to friends at companies like your own and ask about any smoking restrictions there. Reasonable smoking policies may exist within your industry that could help your company.
- Research "successful" smoking policies that try reasonably to accommodate both smokers and nonsmokers. (A total smoking ban is not a reasonable accommodation!)
- Consider possible mechanical or structural solutions. Is your workplace properly ventilated? Would partitions reduce cigarette smoke and noise? Ask management to look into these possibilities.
- Identify informal solutions that could work in your work environment. For instance, you might try either moving individual smoking or nonsmoking employees or building physical barriers between smoking and nonsmoking employees.
- If a smoking policy is being imposed by management without employee input, ask that the workforce be consulted. Firmly, but politely assert your rights.
- If you are represented by a union, discuss your concerns with your steward or other representative. Smoking policy decisions are subject to collective bargaining agreements in most cases. However, the union must speak up for its rights quickly! In addition, your union can ask management to call in an indoor air expert to analyze whether smoke is truly a problem. Most often, poor ventilation—not cigarette smoke—is at the root of poor indoor air quality.
- Recruit support from smoking and nonsmoking coworkers. The larger and more diverse your group, the more likely management will listen *and* respond to your concerns. If necessary, ask workers to sign a petition or letter of support. It's important to conduct such activities before or after work. Employers generally are more open-minded toward initiatives organized on employee rather than working time.

Now you are ready for that meeting. You've reviewed your situation and can sit down with those who are developing the policy to discuss the matter reasonably.

**What should I say
to someone who
wants to enact a
strict smoking
policy or smoking
ban not required
by law?**

Arrange a meeting with those who want the restrictions. During the meeting . . .

- Don't be angry or aggressive. Rather, keep a poised and professional appearance. Stress your willingness to work together to develop a smoking policy based on common sense and courtesy.
- Express your eagerness to reach a solution based on accommodation and compromise. Accommodations often are made for others in the workplace such as allowing employees to listen to music with earphones and moving worksites to avoid annoying neighboring employees. Similar accommodations should be extended to smokers. As one New Hampshire smoker recently noted, "The smell of coffee makes me nauseous and so do some perfumes. Should we ban those things, too?"
- Display your knowledge about the workplace smoking issue. It might reverse feelings toward an all-out smoking ban. Here are some facts you can mention:
 - There is no conclusive research that shows that smokers are less productive employees than nonsmokers. Nor do smoking employees cost their employers more.
 - Environmental tobacco smoke usually is not the cause of the problem, but rather a symptom of a problem—poor ventilation, poor filtration and general contamination of indoor air.
 - Regulating workplace smoking and settling office disputes are not prominent concerns of most personnel managers, and rightly so.
 - When smoking disputes arise, most firms prefer to settle them in a fair and positive manner rather than punish individuals who smoke.
 - Be prepared to suggest two or three alternatives to a smoking ban.
 - Report the support in the office for an informal smoking policy that satisfies both smokers and nonsmokers.
 - If, as a result of the meeting, you are unsuccessful in reaching an agreement, arrange to have a follow-up meeting. Suggest appointing a working group of smoking and nonsmoking managers and employees to resolve the issue. Or request the participation of representatives of labor and management.

Can my union help?

Yes. If you are represented by a union, take your concerns to your steward or other representative. Your union has a right to a voice in determining the rules that affect your workplace. That includes rules about smoking.

Unions can represent your interests through collective bargaining with your employer. They can help to ensure that the smoking restrictions in your office are not dictated by anti-smokers alone, but rather through joint labor-management agreement.

The AFL-CIO has stated that issues related to smoking on the job can best be worked out voluntarily in individual workplaces between labor and management in the manner that protects the interests and rights of all workers.

What are my options? What types of workplace smoking policies exist?

Subject to applicable laws and regulations, employees' options on workplace smoking vary with the layout and circumstances of their worksites. Sometimes, an informal agreement among employees and management defining the respective rights of smokers and nonsmokers will fill the bill.

For example, management can designate an entire work area as a smoking area, giving employees the option of designating their individual work stations as smoking or nonsmoking. Employees would be encouraged to resolve their disputes among themselves. Supervisors may intervene if necessary to make sure both smoking and nonsmoking employees are satisfied.

Formal smoking policies often are more detailed. Generally, they designate where employees can and cannot smoke, for example, in conference rooms and restrooms. Because they are more detailed in what can and cannot be done and how they must be enforced, supervisors have less say in resolving employee differences and cannot be as flexible in accommodating all employees.

Since most formal smoking regulations cannot be adapted to each and every workplace, a flexible approach is often the best avenue. For instance, smoking employees can be moved closer to other smokers, away from those who do not like tobacco smoke. Or, nonsmokers can have partitions that not only stop the direct flow of smoke but also direct cool air at their desks. The end result is that both smokers and nonsmokers are accommodated.

Employees complain about poor air quality, is smoke necessarily the cause?

No. Reports of sore eyes and headaches, usually high employee absentee rates and visible signs of poor ventilation, such as dirty air ducts and stale air, are symptoms of a very real problem known as "sick building syndrome."

Cigarette smoke often is mistaken as the primary cause of indoor air pollution. Tobacco smoke is visible; allergenic fungus, bacteria and invisible gases and fumes that cause symptoms such as coughing, sneezing and watery eyes are not.

In over half the buildings studied over a 15-year period for air quality complaints by the federal government's National Institute for Occupational Safety and Health (NIOSH), poor or inadequately maintained ventilating systems were determined to be the cause.

Firms specializing in analyzing indoor air quality have found evidence of incredible filth in building ventilation systems. This dirt contaminates the air employees breathe and prevents proper air flow. Thirty-eight percent of the buildings studied by one firm, ACVA Atlantic Inc., of Fairfax, VA, were found to have excessively dirty ductwork, including a "pet cemetery of dead rodents, pigeons, snakes and cockroaches."

ACVA Atlantic also found that 34 percent of the buildings they studied had no fresh air intake. To save energy costs, building managers had cut off the amount of fresh air coming into the building. The idea was to save money on heating the building during the winter and cooling it during the summer.

Thirty-one percent moreover, had large amounts of allergenic fungi known to cause sore eyes, sore throats and other allergic symptoms similar to those sometimes blamed on environmental tobacco smoke.

One way to prevent unnecessary and unwarranted smoking restrictions is to ask your employer to run a check on the quality of air in your building. If there is a "sickness," often it can be cured by a flick of the switch on the building's air-handling system to bring more fresh air into the building. Sometimes, all the system may need is a routine cleaning.

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How can I counter claims about the negative health effects of environmental tobacco smoke?

Despite the lack of convincing evidence, the popular misconception persists that environmental tobacco smoke (ETS) has been shown to be harmful to nonsmokers in the workplace. However, the Surgeon General has stated that the data on workplace exposure to ETS are "limited and inconclusive." No reliable scientific proof exists to support the notion that smoke poses a risk to nonsmokers in the workplace.

After reviewing the scientific literature on environmental tobacco smoke, in a review critical of ETS, the National Academy of Sciences said available scientific evidence did not show that "smoking on the job or in public places, such as restaurants, [jeopardized] the health of nonsmokers."

An international conference on indoor air quality in London in June 1988 questioned not only the quantity of evidence but also the quality of the scientific methods by which environmental tobacco smoke and poor health has been linked.

Ready for a few more facts? Research has shown that to be exposed to the nicotine equivalent of one cigarette, a nonsmoker would have to fly in the nonsmoking section of an airplane for 224 straight hours, sit in a restaurant for 17 days and nights or work in an office for 550 continuous hours.

**How can I respond
to claims that
smokers are less
productive than
nonsmokers?**

Such assertions appear unfounded, and, at best, impossible to verify. Scientific establishment of these claims, notes Marvin Kristein, a consultant to the American Health Foundation, "would require studies and data we do not now—and most likely will never—possess."

Even William Weis, the Seattle University accounting professor who first proposed the notion that smokers are less productive concedes that evidence linking employees, smoking and productivity is inconclusive. "Skeptics might argue that these numbers are as soft as the underside of a porcupine," he has written, "and that may be true."

Two-thirds of union officials and supervisors in government and industry say smoking has no significant effect on employee productivity. And, more than 90 percent believe that smoking has no significant positive or negative effect on employee productivity once employees return from smoking during their workbreaks. The same survey found that 64 percent believed a total smoking ban would negatively affect employee morale, leaving smokers alienated and feeling like second-class citizens.

Claims by smoking-restriction advocates that smokers are absent more often than nonsmokers *because* they smoke are unfounded. Experts on both sides of the issue agree that many factors are involved in absenteeism, including age, sex, family responsibilities, personal problems, job satisfaction and commuting time.

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**How can I
persuade my
fellow employees
to speak out
against workplace
smoking restric-
tions that are not
required by law?**

Approach them individually, before or after work or on breaks, to discuss the restrictions in a calm and sensible manner. The emotions that frequently surround the issue encourage misunderstanding and often distort the issue. In your discussions . . .

- Mention that inter-office differences about smoking have existed for years, and that people always have been able to settle their differences through common sense and courtesy.
- Suggest that while cigarette smoke may be an annoyance, it is difficult to regulate annoyances, much less police them. Encourage greater understanding by talking about other annoyances in your own workplace—a colleague's blaring radio, excessive talking or overwhelming cologne. Ask how they would handle complaints about these, compared to those about tobacco smoke.
- Emphasize that by asking management to intervene in office smoking disputes or to establish formal smoking restrictions, employees concede greater control to managers than is necessary—or wise.
- Finally, point out that most formal workplace smoking policies affect secretaries and clerks in open-space areas, not professionals in private offices, and therefore discriminate against the majority of women and minorities who traditionally occupy secretarial and clerical positions.

**Can my employer
prohibit me from
smoking off the
job?**

Only if you let them! Allowing employers to dictate the personal lifestyle of workers both on *and* off the job is a wholly unjustified invasion of your privacy. If your employer establishes such a policy, assert your rights.

**To what extent
should
government
regulate smoking
in my workplace?**

No conclusive scientific proof exists to support the claim that exposure to environmental tobacco smoke in public places is a health risk to nonsmokers. Still, some government officials attempt to promote a "smoke-free society" by focusing on speculation rather than scientific fact. Although the evidence on the smoking and the nonsmoker health issue is inconclusive, they feel pressured to jump aboard and, in some cases, lead the nonsmoking bandwagon.

U.S. Rep. Charlie Rose (D-N.C.) spoke out against such efforts at a recent congressional hearing to consider a proposed ban on smoking in federal offices. He said, "Let's get the science straight. It's not straight right now. . . . [We're] basing this so-called 'necessary act' on very shaky science." Rose's colleague, Rep. Harold Rogers (R-KY) rose to support him and to stress the time-tested success of common sense and courtesy.

George Cooper, a vice president of the New York Chamber of Commerce, opposed government intervention for other reasons. He questioned whether "a single specific law can deal with smoking conditions in the 190,000 business establishments in the city of New York." Cooper noted that since every business is unique, a better approach would be to address the issue at the company level.

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What can I do as a citizen to fight proposed workplace smoking restrictions?

Letters are a relatively easy and inexpensive method to oppose smoking restrictions. They can create awareness of a pending proposal to restrict smoking and can persuade others to join your fight. In doing so, they become a very valuable and effective tool.

Smokers can write several types of letters—to the editor of your local newspaper, to your elected representatives and to your corporate management.

If you decide to write, identify yourself and explain simply and directly from the start why you are writing.

Example 1: I am very disturbed by Harry Smith's recent article (*Times*, Feb. 2) regarding smoking in public places...

Example 2: As an employee in Widget International's Detroit facility, I am very concerned about the proposed smoking restrictions under consideration by the company....

Example 3: As a small business owner, I oppose City Ordinance Number 4567, which would restrict smoking in public places....

Then, briefly summarize several supporting points—including any of those you have read here. Letters should be neatly written and not exceed one page. They also should include your home address and daytime phone number.

It's a good idea to send copies to others. Letters to the editor, for instance, also could be sent to your city council member, state representative or congressperson. Letters to your government representatives also can be sent to your newspaper editor or the editorial director of your local television station.

Some employers feel it necessary to establish workplace smoking policies. Some do not. For those who do, smokers are encouraged to work with their colleagues and supervisors to come up with a policy that is balanced and fair to all based on common sense and courtesy.

If you have additional questions on the workplace smoking issue,
or would like more information, write:

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